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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROBERT JOSEPH MCCARTY,

Plaintiff,

v.

JOHN V. ROOS, et al.,

Defendants.

2:11-CV-1538 JCM (NJK)

ORDER

Presently before the court is pro se plaintiff Robert Joseph McCarty's motion for a certificate of appealability. (Doc. # 220).

I. Background

On September 16, 2013, plaintiff filed a motion to vacate his status as a registered sex offender pursuant to 28 U.S.C. § 2255. (Doc. # 197). On September 20, 2013, the eight federal defendants in this case filed a motion to stay the § 2255 motion pending the resolution of two outstanding motions to dismiss, as the court's decision on these motions could eliminate the issues in dispute with regard to these defendants. (Doc. # 200). On October 4, 2013, Magistrate Judge Koppe, in consultation with this court, granted the motion to stay and denied plaintiff's § 2255 motion without prejudice. (Doc. # 218). Petitioner filed this motion seeking a certificate of appealability for his § 2255 motion. (Doc. # 220).

II. Legal Standard and Discussion

Before the denial of a § 2255 motion can be appealed, a district court must have issued a final

1 judgment on the motion. 28 U.S.C. § 2255(d). A district court's dismissal of a filing *without*
2 *prejudice* does not qualify as a "final judgment." *See Conway v. Slaughter*, 440 F.2d 1278, 1279 (9th
3 Cir. 1971).

4 In this case, plaintiff's motion for a certificate of appealability is not warranted, as this court
5 merely dismissed his § 2255 motion without prejudice pending its decision on several outstanding
6 motions to dismiss. Plaintiff may have the opportunity to re-file his § 2255 motion depending upon
7 the court's decision regarding these motions to dismiss. Thus, this court has not issued a final
8 judgment on plaintiff's § 2255 motion, and a certificate of appealability would not be appropriate
9 at this time. Therefore, the court will deny plaintiff's motion.

10 Accordingly,

11 IT IS HEREBY ORDERED ADJUDGED AND DECREED that plaintiff's motion seeking
12 a certificate of appealability (doc. # 220) be, and the same hereby is, DENIED.

13 DATED October 23, 2013.

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16 **UNITED STATES DISTRICT JUDGE**
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